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Caroline P. Jensen v. Georgian Corporation, Inc. : Brief of Appellant

Utah Supreme Court

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In the Supreme Court of the State of Utah

CAROLINE P. JENSEN,
Plaintiff and Appellant,

vs.

GEORGIAN CORPORATION, INCORPORATED, a corporation,
Defendant and Respondent.

CASE NO. 8708

BRIEF OF APPELLANT

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NEW CENTURY PRINTING CO., PROVO, UTAH

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STATEMENT OF CASE

This is an appeal from a judgment entered upon a verdict of the jury in favor of Georgian Corporation, Incorporated, defendant and respondent, and against Caroline P. Jensen, plaintiff and appellant, in the Fourth Judicial District Court of Utah County. For convenience we will refer to the parties as plaintiff and defendant in this brief. We deem the issues drawn by the pleadings of the parties in this case of such importance as to warrant a brief analysis at the outset.

In her Complaint, as amended, the plaintiff alleges that she received serious permanent injuries as a result of tripping over a steel sewer plug which protruded above the surface of the concrete floor in the basement laundry provided for her as an apartment house tenant of the defendant. Plaintiff further alleges that the negligence of the defendant consisted in its allowing "a steel plug . . . to protrude and project upwards from the surface of the floor several inches, and so located as to create a dangerous and unsafe condition for plaintiff's laundry work . . ." (R. 4-5). These allegations the defendant denied (R. 7). Plaintiff further alleges that the dangerous and unsafe condition existed for more than two years prior to the plaintiff's injury, during which time "defendant had knowledge and had been warned thereof" by tenants "that same was exposing said tenants to injury;" but that defendant "with reckless disregard for plaintiff's safety, failed, neglected and refused to remove said steel plug from said floor," thus proximately causing plaintiff's injury (R. 11). This also was denied by the defendant (R. 13). In its Amended Answer, defendant pleaded affirmatively plaintiff's contributory negligence and assumption of risk (R. 7 and 9).

The issues arising from these allegations of negligence by plaintiff and from their denial by defendant are as follows:

1. Was it negligence for the defendant to allow the sewer plug to protrude above the surface of the concrete floor in the laundry area provided for plaintiff in which to do her laundry work?

2. Did the plug's protruding above the surface of the basement floor create a dangerous condition?

3. Did the defendant have knowledge of this danger-

ous condition for more than two years prior to the time of plaintiff's injury?

4. Was defendant warned of the dangerous condition and of the fact that its tenants were being exposed to injury?

5. Did the defendant fail and refuse to heed these warnings and remedy the dangerous condition before the plaintiff received her permanent injuries?

At the trial the plaintiff adduced evidence in support of the foregoing allegations of her Complaint. Plaintiff sought at the trial to have her theory of the defendant's liability presented to the jury in her Requests for Instructions Nos. 3, 5, 8, 11, and 12 (R. 77, 79, 81, 85, and 86), which requests the court refused to give, and to which refusals the plaintiff excepted.

Over plaintiff's objections as to its materiality, the court admitted in evidence a portion of the Provo City Plumbing Code, and also expert testimony that defendant had complied with that code in the installation of the sewer plug in the basement in question. The court gave the jury Instruction No. 15, which quoted the said Provo City Plumbing Code without any comment whatsoever, taking same from defendant's Requested Instruction No. 12 (R. 29 and 66), to which instruction plaintiff excepted. The court admitted, over the objection of the plaintiff on the ground that it was immaterial and improper opinion evidence, testimony of expert witnesses that the sewer plug was properly located in accordance with the said sanitary code, although the said expert witnesses also testified that the installation and location of the plug had nothing to do with safety. All of the foregoing matters were called to the attention of the court in plaintiff's Motion for New

Trial, which motion was duly argued, and denied by the court (R. 94, 95, 96 and 100). From the judgment entered upon the verdict and from the court's Order Denying Plaintiff's Motion for New Trial this appeal is taken.

STATEMENT OF FACTS

In support of her Complaint as amended, plaintiff proved the following facts at the trial:

Plaintiff is an elderly woman of the age of 67 years, has a family of four children, all of full legal age, and has been a tenant in Apartment No. 43 in defendant's Georgian Apartments in Provo, Utah, since 1952 (Tr. 179-180). During that period she kept house in that apartment for herself and two members of her family Jessie Jensen and Bobby Jensen. She rented the apartment from one Carl B. Clegg, defendant's manager, and the laundry area in the basement of the south wing of the apartments was assigned to her for her use in doing her laundry in common with other tenants of defendant's apartments (Tr. 181-183). Each week during her tenancy, plaintiff, with the help of her children Jessie and Bobby, did her laundry work in this basement laundry area (Tr. 182). The general layout of this basement laundry is shown by the plat, Exhibit P-1 (R. 90). The area is a little over 60 feet from east wall to west wall, and a little more than 20 feet from north wall to south wall. The walls and floor are of concrete, and the partitions form three rooms. Laundry sinks are located in the east room and the west room, and there is a washer located near the sink in each of the two rooms. The middle room is used exclusively for drying clothes. Along the walls of the rooms, principally along the north wall, lockers are provided for the use of the tenants. In

each of the three rooms lines for hanging clothes have been provided. A stairway leads into this area from the east end, and this was the entrance regularly used by plaintiff to enter and leave the area. Plaintiff did her washing in the east room but had always had access to the facilities in all three of the rooms each week when she did her laundry (Tr. 182-184).

In the floor of the west room, about four and one-half feet south of the front of the north locker and about five and one-half feet west of the east locker, a metal sewer plug was located which served as a clean-out for the sewer line which ran beneath the surface of the floor. The base of the sewer plug is about four inches in diameter and is level with the floor, but the plug had a metal wrench shoulder about one and one-fourth inches square, projecting and protruding upwards to about one inch above the surface of the concrete floor, as shown by Exhibits P-2 and 2A (R. 90). This sewer plug thus protruding above the surface of the floor lay directly in the path which tenants, entering the west room from the drying room, were obliged to move along in order to hang clothes on the west lines in the southwest corner of the west room (Tr. 93-94). The metal shoulder of the sewer plug, located as it was, and protruding above the smooth surface of the floor, created a hazardous and dangerous situation for defendant's tenants using the laundry area almost from the beginning of its occupancy. The witness, Clegg, manager or defendant's apartments from 1951 to 1954, and his assistant, both tripped over the plug in the early part of this period. Clegg, while on a tour of inspection in this very laundry area with "Nick," one of defendant's principal officers and its President (Tr. 234), pointed the sewer plug out to him and said,

"This is something that ought to be taken care of or somebody's going to fall and hurt themselves." Also, Clegg thereafter on "quite a few inspections" pointed out the sewer plug to "Nick" and told him it should be taken care of (Tr. 172 and 173). Defendant's tenants Backman and Tanner, as well as one Jex and Wisemiller, doing work in the laundry area, were either seen to trip over the sewer plug or advised Clegg that they had so tripped (Tr. 163-170). In the spring of 1953, Vera Backman, one of defendant's tenants, tripped over the sewer plug and so advised Clegg, the defendant's manager (Tr. 73-74). But nothing was ever done by the defendant about removing the plug, up to the time Clegg left in February of 1954 (Tr. 173). The witness Planty was a tenant in the defendant's apartments from 1951 until 1955, and did her laundry work in this same area. She frequently observed both manager Clegg and manager Price, after Clegg left, in the west room of the laundry in the vicinity of the sewer plug in question (Tr. 23-24). She testified that she tripped over the plug herself and saw others trip over it (Tr. 24-25), and that defendant's then assistant manager, Price, saw her do so on one occasion, which was in about the year 1953. She believed that the sewer plug was dangerous and advised manager Clegg of her tripping (Tr. 26). The witness Miller, another tenant of defendant's apartments from August 1954, to August, 1955, testified that on occasion she saw defendant's manager down in the laundry area in the west room, and that she herself had tripped over the plug several times during that year (Tr. 39, 41, 42), and that nothing had been done to remove it (Tr. 46). The witness Bobby Jensen tripped over this sewer plug about three months before plaintiff, his mother, was injured on

it (Tr. 50, 51, and 52). He advised defendant's manager, Price, "that plug ought to be changed; somebody's going to trip and hurt themselves," but nothing was done to remedy the situation. About a year and a half before her mother was injured, the witness Jessie Jensen tripped over this sewer plug while coming from the lines in the west room where she had hung up clothes. She so advised defendant's manager, Price, telling him, "You ought to have that plug fixed," but no change in the plug was thereafter made (Tr. 94-95).

Plaintiff had tripped over this same sewer plug "quite a while before" her serious injury on April 6, 1956, and had advised defendant's manager, Price, of it; but nothing was ever done to remedy the condition of the protruding plug (Tr. 189-190). The witness Price, defendant's manager, recalled that Bobby Jensen advised him about two weeks after Clegg left, which was in the spring of 1954, that the sewer plug should be changed, "that he thought it was dangerous," and that he, Price, had agreed with him about the danger (Tr. 215-216). From these facts the conclusion is warranted that the protruding sewer plug in the laundry area provided by defendant for the use of plaintiff and its other tenants was a dangerous hazard from the time the apartment house was opened for tenants in 1951; that the defendant's managers and principal officer knew full well of same; and that nothing was done about the plug until after plaintiff had sustained her serious and permanent injuries on April 6, 1956, when the defendant caused the said plug to be removed and a new sewer plug, level with the surface of the surrounding concrete floor, to be installed (Tr. 216).

On the evening of April 6, 1956, while plaintiff was us-

ing the west room of the laundry area, which she had done all during her tenancy (Tr. 182) without objection of defendant's managers, (Tr. 229) she tripped and fell over the protruding plug (Tr. 184-185). Because of an old arthritic fusion condition of a vertebrae of her spine (Tr. 144-145) plaintiff was proceding carefully at the time she tripped over the plug (Tr. 187-188). In the fall plaintiff broke her right hip bone and suffered other injuries (Tr. 190-191). Dr. Kezerian diagnosed the injury as an "intracapsular fracture of the right hip" (Tr. 128), performed a surgery called "replacement prosthesis" (Tr. 134) in which a metal socket called "vitallium" replaces the hip socket bone (Tr. 136), and characterized the damage as permanent, stating that, "she will always limp" (Tr. 138). The doctor gives his prognisis and describes plaintiff's condition as of April 9, 1957, stating at the end thereof that, "I believe it is permanent" (Tr. 139, 140, and 141).
The sewer plug was allowed to remain protruding above the surface of the west basement room floor by defendant's managers and officers until a few days after plaintiff had suffered her serious and permanent injuries, when defendant's manager, Price, changed it and put an inverted type of sewer plug in its place (Tr. 216 and 230).

By the testimony of two witnesses, Woods (Tr. 254-282) and Hodson (Tr. 285-294), the defendant sought to defend on the grounds that the sewer plug in question was installed in the Georgian Apartments in accordance with the Provo City Plumbing Code. Over plaintiff's objection on grounds of materiality, the court allowed Woods to testify concerning the plumbing code requirements (Tr. 261). A portion of the plumbing code of Provo was received in evidence over the objection by the plaintiff that

it was immaterial and irrelevant to the issues (Tr. 262). A further objection by plaintiff to the questions put to Woods about the proper location of the sewer plug relative to the requirements of the plumbing code on the grounds that it was immaterial was overruled by the court (Tr. 263-265). Woods admitted that his testimony pertained to the location of the pipelines and sewer plug under the sanitary plumbing code (Tr. 271-272). On cross-examination when Woods was asked if there was anything in this code requiring that the plug be put in with a metal shoulder protruding above the surface of the floor, the court sustained defendant's objection thereto that it was not proper cross-examination (Tr. 273-274). Woods further testified that the location of the plug had been determined solely by considerations of sanitation, that safety had no bearing on that installation, and that the code does not require the protrusion of the metal shoulder above the surface of the traveled portion of the floor (Tr. 279-280). Over plaintiff's objection that it was immaterial, Hodson was permitted to testify as to the location of the plug with regard to the code (Tr. 289). However, Hodson also testified that the code was for sanitary purposes only; that it does not require the plug to protrude above the surface of the floor; and that he never considered the safety factor at all in connection with his testimony (Tr. 294).

Upon these facts as they appear in the record, it is plaintiff's position that the court committed prejudicial error (1) in admitting the testimony offered by defendant that the sewer plug was properly located on the basement floor, and in further admitting in evidence a portion of the Provo City Sanitary Plumbing Code, because the Code had no relevance to the issue of safety raised by the pleadings,

and applied only to sanitary considerations; (2) by giving Instruction No. 15, which contained only the portion of the said Provo City Sanitary Plumbing Code admitted in evidence and quoted verbatim in said instruction, without any comment by the court as to its possible application to the facts of the case or any comment whatsoever; and (3) by refusing to give plaintiff's Requested Instructions numbered 3, 5, 8, 11, and 12, which embodied her theory of defendant's liability under the issues raised by the pleadings and the evidence.

STATEMENT OF POINTS

POINT I

THE COURT COMMITTED PREJUDICIAL ERROR BY ADMITTING DEFENDANT'S EXPERT TESTIMONY THAT THE SEWER PLUG IN QUESTION WAS INSTALLED IN ACCORDANCE WITH PROVISIONS OF THE PROVO CITY SANITARY CODE UNRELATED TO SAFETY; ALSO BY ADMITTING THE SAID CODE PROVISIONS IN EVIDENCE; AND BY GIVING THE JURY INSTRUCTION NUMBER 15, SETTING OUT SAME WITHOUT COMMENT.

POINT II

THE COURT COMMITTED PREJUDICIAL ERROR BY REFUSING TO GIVE PLAINTIFF'S REQUESTED INSTRUCTIONS NUMBERED 3, 5, 8, 11, AND 12, THUS DENYING PLAINTIFF THE RIGHT TO HAVE HER THEORY OF DEFENDANT'S LIABILITY UNDER THE FACTS OF THIS CASE PRESENTED TO THE JURY.

THE ARGUMENT

POINT I

THE COURT COMMITTED PREJUDICIAL ERROR BY ADMITTING DEFENDANT'S EXPERT TESTIMONY THAT THE SEWER PLUG IN QUESTION WAS INSTALLED IN ACCORDANCE WITH PROVISIONS OF THE PROVO CITY SANITARY CODE UNRELATED TO SAFETY; ALSO BY ADMITTING THE SAID CODE PROVISIONS IN EVIDENCE; AND BY GIVING THE JURY INSTRUCTION NUMBER 15, SETTING OUT SAME WITHOUT COMMENT.

Plaintiff made no claim in her pleadings, or at the trial, that the negligence of the defendant consisted in the violation of an ordinance or statute. Nor in its pleadings did the defendant seek to defend on the theory that it had complied with an ordinance or statute. At the trial, however, defendant did offer evidence which was intended to show that it was free from negligence because the sewer plug in question had been located in accordance with a sanitary code plumbing ordinance of Provo City. The said plumbing code was and is wholly unrelated to the interest of plaintiff which was violated, or to any claim that she made about the negligence of defendant. Plaintiff's claim is that defendant allowed the metal wrench shoulder in question to protrude above the surface of the basement floor over which the plaintiff, and the other tenants, had to pass in order to do their laundry work, and that this condition was dangerous and a hazard to their safety, all of which was well known to the defendant for a period of years, and that no remedial action was taken by it. De-

spite the fact that the plaintiff's claim was overwhelmingly supported by her evidence, as well as that of the defendant, the court, over her objection on grounds of immateriality and that it was outside the issues raised by the pleadings, allowed defendant to give evidence that the sewer plug in question was placed on the basement floor in accordance with a sanitary plumbing code provision, and admitted the code in evidence. Furthermore, the court subsequently gave Instruction No. 15, setting out the sanitary code provision in question without any comment whatsoever about its possible connection with plaintiff's charge of negligence against defendant. It is plaintiff's position that the court in so doing committed error which was misleading to the jury and highly prejudicial to the plaintiff.

The said Provo City Plumbing Code provisions as quoted from the court's Instruction No. 15, are as follows:

> "You are instructed that the Plumbing Code of Provo City, Utah,, provides:
>
> 'Cleanouts shall not be less in size than the pipe served, up to four (4) inch pipe. Cleanouts for screw pipe and fittings shall be heavy cast brass plugs with a solid wrench shoulder, not less than one (1) inch thick and one (1) inch high . . .
>
> 'Cleanouts shall be installed in the building drainage system at all right angle or ninety (90) degree changes in direction and at the end of all horizontal lines of soil, waste and drain pipes . . . and provided further, that, the location and number of cleanouts required in each installation of soil, waste and vent pipes shall be subject to the approval of the plumbing inspector.' "

Defendant's witnesses, Woods and Hodson, both ad-

mitted on cross-examination that the quoted code did not require that the metal wrench shoulder of said sewer plug protrude above the surface of the well-traveled basement floor, and in fact both witnesses admitted that the location of the plug had been determined solely by considerations of sanitation, and that their testimony did not at all go to the safety factor in allowing the sewer plug to so exist. Obviously, the plumbing code provisions go only to the protection of interests involved in sanitation and health; on the other hand, that interest of plaintiff which was violated was unrelated to the code on the pleadings and the record, the interest violated being that of physical security from violent injury, and not her interest to be free from disease caused by unsanitary conditions.

On what theory the court admitted the Provo City Plumbing Code and evidence pertinent thereto is not disclosed by the record. Certainly the defendant made no claim that the plaintiff's claimed contributory negligence was her violation of the provisions of the said plumbing code. Nor did the plaintiff claim that defendant had violated the same. Had there been such claim, the applicable principle of law in such cases is stated as follows in 38 **American Jurisprudence,** Section 158, at Page 827 and following:

> "Comprehensively stated, the rule is that where a statute or municipal ordinance imposes upon any person a specific duty for the protection or benefit of others, if he neglects to perform that duty, he is liable to those for whose protection or benefit it was imposed for any injuries of the character which the statute or ordinance was designed to prevent, and which were proximately produced by such neglect, provided,

according to the rule prevailing in some, but not all, jurisdictions, the plaintiff is free from contributory negligence."

And see to the same effect: **Prosser on Torts,** Section 39, Page 264; **Restatement of the Law, Torts,** Volume 2, Section 286, Page 752; and **Utah Law Review,** Volume 3, Page 397. See also **Mechler vs. McMahon,** 239 N. W. 605, where it was said by the court at Page 607:

> "We now state the rule to be that, in the absence of valid excuse or justification, the vloiation by the injured person of a statute or ordinance enacted for the benefit of the other party is conclusive evidence of contributory negligence, if such violation proximately contributes to the injury. The rule in this state has always been that the unjustified violation by the defendant of a statute or ordinance enacted for the benefit of the injured party is negligence per se, if it proximately results in injury.
>
> "If the statute or ordinance was not enacted for the benefit of the party invoking it, the general rule is that it is wholly immaterial, although the acts which constituted violation may be admissible on the question of common law negligence. In other words, the general rule is that the violation of such statute or ordinance is not even a circumstance to be considered on the question of negligence or contributory negligence. Whether such statute or ordinance was enacted for the benefit of a particular person is a question of law."

The defendant seems to imply that the rule above stated applied to it conversely, i. e., that because the sewer plug in question had been installed and located in its basement laundry area floor, defendant was thereby cleared of

any negligence whatsoever. Plaintiff maintains, however, that the principle could not be applied conversely thus for the reason that the ordinance in question was not enacted for the benefit of the defendant who invoked it, nor to protect that interest of the plaintiff which was violated, and that same was not designed to prevent the injuries she received as a result of the unsafe condition of the protruding sewer plug. In fact, the said plumbing code provisions can have no relevance to the claim of negligence with which plaintiff charged the defendant: namely, that the sewer plug being allowed to protrude above the surface of the floor was a hazard to her safety.

Defendant seems to justify the admission of the plumbing code provisions and evidence pertaining thereto, by contending that the doctrine of "what the law specifically authorizes cannot be wrongful." Here again the defendant's implication is—even though the plaintiff made no claim that the plumbing code provisions had been violated by defendant—that the location and installation of the sewer plug in accordance with that ordinance having as its purpose sanitary matters, such as the preservation of health, relieved defendant of any responsibility on its part to keep the area provided for plaintiff as an incident of her tenancy free from safety hazards. Most courts apply this doctrine very narrowly and against the contention of defendant .

The case of **McGettigan vs. New York C. R. Co.,** 268 N. Y. 66, 196 N. E. 745, 99 A.L.R. 283 (1935) involved an action for damages sustained by plaintiff when the vehicle in which she was riding struck the concrete base of a signal placed by the defendant in the center of a highway adjacent to its railroad tracks. Plaintiff recovered in the

lower court, and on appeal the defendant urged a reversal of the judgment on the ground that the object struck had been authorized and installed by law, and that therefore there could be no civil responsibility for damages in the action. The legal requirement pursuant to which the signal was placed came from an order o the Public Service Commission for its installation. It was undisputed that defendant was required to comply with such an order. The principle point relied upon by the defendant was that it owed no duty to the plaintiff beyond that defined by the order of the Public Service Commission. The Appellate Court concluded that the matter was properly submitted to the jury, and at page 286 of A.L.R. report the following was said:

> "The problem, it may be observed again, is to settle by construction the limits of the orders of the Public Service Commission. The doctrine that what the law specifically sanctions cannot itself be wrongful has been narrowly applied in this court. 'We need not discuss the cases, or consider how broadly the doctrine should be permitted to operate, since one condition or limitation has been firmly grafted upon it, which raises the final and ultimate question in the case before us. That limitation is that the authority which will thus shelter an actual nuisance must be express, or a clear and unquestionable implication from powers conferred, should be certain and unambiguous and such as to show that the legislature must have contemplated the doing of the very act in question.' Hill vs. Mayor, etc., of City of New York, 139 N. Y. 495, 501, 502, 34 N. E. 1090, 1092. See 1 Street on the Foundation of Legal Liability, pp. 41-45.
>
> "Authority to defendant to place the signal apparatus in the center of the highway was conferred in

> general terms of mere permission. There was no imperative command that the structure if so located was to be maintained with the specific equipment and nothing more. Indeed, there is no negative word in either order of the Public Service Commission. Defendant is not here held liable merely because it made an unwise choice between the alternatives afforded by the orders. As we read them, a larger discretion was thereby left to defendant, and the presumption is that this discretion was intended to be exercised in conformity with private rights. (citing cases) . . . We can find no room for the implication that defendant was to be immune although (as the jury could have found) it kept a dangerous thing in the highway after knowledge of the danger."

The evidence in the case at bar clearly establishes the protruding wrench shoulder to be a nuisance. There is no express or implied authority in the Plumbing Code invoked by defendant which will sanction the existence of such a nuisance. The annotation in 99 A.L.R. 287, cites cases which support plaintiff's contention that aside from the mandate of law as embodied in an ordinance, a person is still required to exercise such rights in conformity with private rights and, therefore, is not excused from the responsibility that the law of negligence places upon him.

In the present case, there is no reason in logic or justice which would justify admitting in evidence either the Provo City Sanitary Plumbing Code, or the testimony of defendant that the construction of the sewer and drains and the clean-out plug in question was performed in accordance with that code, since the same was not intended to have any application to the safety of tenants using the

said area for laundry purposes as an incident of their tenancy.

It is plaintiff's position that the court's Instruction No. 15, setting forth the bare provisions of said sanitary plumbing code, with neither comment nor explanation as to its possible application to the evidence in the case, was misleading to the jury and highly prejudicial to plaintiff. This instruction was taken verbatim from defendant's Request No. 12 as amended, but the court struck therefrom the following comment about the code quoted:

> "If you find by the preponderance of the evidence in this case that the clean-out plug of which the plaintiff complains was installed in compliance with this provision of the Provo City Plumbing Code then you may not find that defendant was guilty of any negligence in the installation, use, or maintenance thereof, and in that event your verdict should be for the defendant and against the plaintiff, no cause of action." (R. 66).

Apparently the court regarded the comment stricken as improper, but made no comment whatsoever as to what application the quoted code might have to the evidence in this case. This left the jury free to speculate on the immaterial evidence admitted over plaintiff's objection and to conclude that defendant was not guilty of negligence because the sewer plug in question was installed as required by the quoted code, which in any case clearly had nothing to do with safety, but was enacted for sanitary purposes alone.

Common experience with jurors leads us to the conclusion that to quote a law in an instruction without comment or explanation as to its relevance to the facts in evi-

dence to be considered by the jury leaves its members free to speculate about its possible meaning, and is misleading and highly prejudicial to the party against whom it is invoked.

Meadors vs. Huffman, 127 P2d 806 (1942), was a case in which the plaintiff had been injured by falling into an uncovered opening in a street in the City of Oklahoma City. Plaintiff offered an ordinance of that city pertaining to unguarded openings adjacent to a street, sidewalk or alley, claiming that defendant had violated same and was guilty of negligence per se. The ordinance was received in evidence and the court instructed the jury that its violation constituted negligence per se, and plaintiff recovered. On appeal the question oncerned the materiality of the ordinance in question and whether the court's instruction thereon was error. The court held that "the ordinance, . . . is inapplicable, and was not admissible in evidence for any purpose" on the ground that it did not apply to the area in question and that the court's instruction thereon was prejudicial error. On the question of the prejudicial effect of admitting such an ordinance and instructing thereon, the court had the following to say at page 808 of Pacific Reporter:

> "Considering these things together the instruction, if not tantamount to directing a verdict for the plaintiff, was at least strongly suggestive and persuasive of such action by the jury. If the minds of the jury were influenced by the ordinance and the instruction and believed that the defendant was negligent as a matter of law, they could not at the same time have given proper consideration to the defense of the defendant including that of contributory negligence."

The judgment of the lower court was reversed, largely upon the court's opinion about the extremely prejudicial effect of admitting in evidence and instructing the jury upon the ordinance in question, and the strongly persuasive effect that the bare citation of such enactments of law have upon juries.

POINT II

THE COURT COMMITTED PREJUDICIAL ERROR BY REFUSING TO GIVE PLAINTIFF'S REQUESTED INSTRUCTIONS NUMBERED 3, 5, 8, 11, AND 12, THUS DENYING PLAINTIFF THE RIGHT TO HAVE HER THEORY OF DEFENDANT'S LIABILITY UNDER THE FACTS OF THIS CASE PRESENTED TO THE JURY.

Defendant's denial of plaintiff's allegations in her Complaint, as amended, that the sewer plug in question, which protruded and projected upwards from the surface of the floor, was so located as to create a dangerous and unsafe condition which existed for more than two years prior to plaintiff's injury, during which time defendant had been warned that the same was exposing the tenants to injury, but that defendant "with reckless disregard for plaintiff's safety, failed, neglected and refused to remove said steel plug from said floor," clearly created the principle issue upon which the parties went to trial. The evidence adduced by plaintiff overwhelmingly supports her claim, as indicated by the proven facts on the record. There can be no question but that the defendant landlord could not, charged as it was by this array of uncontradicted evidence about the dangerous condition created by this protruding sewer plug, defeat plaintiff's action to recover for her seri-

ous and permanent injuries by the plea of contributory negligence and assumption of risk . The cases so holding are collected in a recent annotation in 25 A.L.R. 2d 364, et seq. A New Jersey case is there cited which seems to reflect the situation obtaining in the case at bar. At page 403 of the annotation it is stated as follows:

> "Since there was evidence that the defendant landlord had actual notice that nails were projecting from the steps of a common stairway in his tenement house long before the plaintiff, a tenant, was injured when her skirt caught on the protruding nails, causing her to fall, it was held in Kramer vs. Lehrhoff (1923) 99 N.J.L. 47, 122 A 540, that the plaintiff could not be charged with assumption of risk or contributory negligence in using the stairs, the court saying that the landlord was not entitled to assume a laissez faire attitude, relying in perfect security upon the contributory risk his tenants necessarily incurred in the use of the leased premises, and that the tenant was not obliged, rather than use the stairs and assume the risk, to confine herself to her apartment 'in comforting meditation upon the benignant solicitude of the landlord.' "

To the same effect see: **Burt vs. Baker** (1937) 22 Cal App. 2d 501, 71 P2d 335; **Farrell vs. Weisman,** (1932) 108 N.J.L. 458, 158 A. 826; **Palmer vs. Dearing** (1883) 93 N. Y. 7; **Finch vs. Willmott** (1930) 107 Cal App 662, 290 P 660; **Lebovies vs. Howie,** 307 Mich. 306, 11 N. W. 2d 906, 908; **Cunningham vs. Silverstein** (Pa.) 40 Lack. Jur. 42, 46; **Mundy vs. Stiles** (Tex. Civ. App.) 257 S. W. 2d 750; and see also 25 A.L.R. 2d 444, at page 447, where it is said:

> "The same circumstances relied upon to charge the landlord with constructive notice of the defective condition will also ordinarily tend to establish notice

on the part of the plaintiff, and so reflect upon the issues of contributory negligence and assumption of risk. However, while it is generally held that such notice is a relevant circumstance in determining whether the mode of use by the plaintiff showed a proper consideration for his own safety, the courts have usually held that the mere fact of continued use will not be enough to establish, as a matter of law, that the plaintiff was contributorily negligent or had assumed the risk."

No complaint is made by plaintiff that the court instructed the jury in Instructions Nos. 4, 10, 17, 20, 24, 26, and 28, embodying defendant's theory of the case , largely in relation to its pleas of contributory negligence and assumption of risk on the part of plaintiff. But plaintiff does complain that it was prejudicial error for the court to refuse to instruct the jury in her Requested Instructions numbered 3, 5, 8, 11, and 12, embodying her theory of the defendant's liability on the pleadings and facts adduced in support thereof at the trial.

Briefly summarized, plaintiff's requested instructions which the court refused to give were as follows:

Request No. 3 asks the court to instruct that defendant corporation could act only through its officers and employees, that the defendant's apartments were being operated by its managers with whose acts it would be charged, that Clegg and Price were such managers from the fall of 1951 to the time of plaintiff's injury, and had been given notice of the hazard of the protruding floor plug while they were acting within the scope of their authority. This instruction was clearly proper on the evidence, since both Clegg and Price admitted that they were defendant's managers during the period mentioned, and that notice of the

hazardous condition of the floor plug had been given to them by tenants, including plaintiff.

Request No. 5 goes to the question of plaintiff's choice of going into the dangerous situation in the laundry area, about which she had knowledge, in order to accomplish the purpose for which defendant had provided her with the laundry area. It has to do with the question of whether or not plaintiff assumed an unreasonable risk in going into the laundry area to do her laundry when, despite the dangerous situation existing there, and its being well known to defendant, no other place was supplied her in which to do her laundry.

Request No. 8 gives the jury the facts, which are overwhelmingly supported by the evidence, about the existence of the protruding sewer plug in the laundry area, about plaintiff being obliged to pass same when doing her laundry work, about defendant failing to supply plaintiff any other place to do her laundry work, about her continuing to do such work in the area knowing of the existence of the protruding sewer plug, thus exposing herself to the risk of bodily harm, and that she was not guilty of contributory negligence, unless her going into the area to do her laundry was assuming an unreasonable risk.

Request No. 11 asks the court to instruct the jury as to the meaning of "reckless disregard for the safety of another." We believe that the instruction is proper upon the pleadings, the evidence and the law in this case. It states that the defendant knew through its managers, and indeed through its President and one of its principal owners, during the period of 1952 to 1956, when plaintiff was injured, that the condition created by the sewer plug was hazardous, that tenants were tripping frequently during all of

said period, and that defendant failed to do anything about it until after plaintiff was rendered a cripple for life by tripping and falling over it. Under these facts, it is for the jury to say whether or not the conduct of the defendant in thus failing to prevent injury to its tenant was in reckless disregard of the safety of another.

Request No. 12 presents the facts which are overwhelmingly supported by the evidence on these issues raised by the pleadings and, as does these other instructions the court refused to give, embodies plaintiff's theory of defendant's liability under the law and the facts in this case.

We call attention to the fact, which is alleged in the Complaint and admitted by defendant's Answer, that the plaintiff, at the time of her injury, was doing her washing in the laundry area of defendant's apartment house, where she had a right to be because defendant provided same for such use. Plaintiff had a clear right to exercise the privilege afforded her by defendant to do her washing in the laundry area, which was the only place provided for her to exercise that right. In this situation the plaintiff was subjected to danger by the defendant's negligently allowing the plug to remain in the floor where she had to pass while doing her washing. In such a situation the **Restatement of Law, Torts,** Volume 2, Section 473, at page 1243, states the rule of law applicable as follows:

> "If the defendant's negligence has made the plaintiff's exercise of a right or privilege impossible unless he knowingly exposes himself to a risk of bodily harm, the plaintiff is not guilty of contributory negligence in so doing unless the risk is unreasonable."

It is submitted that the plaintiff, who had a right to

be where she was to do her laundry work, cannot be deprived of her right to recover the damages she sustained on the defendant's plea of contributory negligence and assumption of risk, principally because the risk she took and had taken for some years prior to the occurrence of this serious accident, was not an unreasonable one.

Furthermore, plaintiff claimed in her Amended Complaint, and the claim is preponderatingly supported by the evidence, that defendant knowingly allowed this dangerous condition of the sewer plug to exist for such a long period of time that the action in so doing constituted reckless disregard for the rights of the plaintiff. The law supporting plaintiff's position in this regard is stated in the **Restatement of the Law, Torts,** Volume 2, Section 482, at page 1261-2, as follows:

> "(1) Except as stated in sub-division (2), a plaintiff's contributory negligence does not bar recovery for harm caused by the defendant's reckless disregard of the plaintiff's safety.
>
> "(2) A plaintiff is barred from recovery for harm caused by the defendant's reckless disregard for the plaintiff's safety if, knowing the defendant's reckless misconduct and the danger involved to him therein, the plaintiff recklessly exposes himself thereto."

The comment following this rule refers to a definition of reckless misconduct as defined in Section 500, which follows at page 1293:

> "The actor's conduct is in reckless disregard of the safety of another if he intentionally does an act or fails to do an act which it is his duty to the other to do, knowing or having reason to know of facts which would lead a reasonable man to realize that the ac-

tor's conduct not only creates an unreasonable risk of bodily harm to the other but also involves a high degree of probability that substantial harm will result to him."

Again, we call attention to the fact that the defendant knew of the dangerous situation created in the laundry area by the plug, and had been repeatedly warned that someone would be hurt unless it was remedied. Despite this fact, the defendant failed and neglected to do anything about the danger, until the serious accident which has made the plaintiff an invalid for life occurred. We submit that under these facts, and under the law above referred to, the defendant was guilty, not only of negligence, but of a reckless disregard for the safety of its tenants, including plaintiff, who had a right to use the laundry area. In any event the law accords the plaintiff the right to have this, her theory of defendant's liability, submitted to the jury. Under such circumstances, our position is that defendant cannot hide behind the rule of contributory negligence and assumption of risk and oblige the plaintiff "to confine herself to her apartment 'in comforting meditation upon the benignant solicitude of the landlord,'" as was said by the court in the New Jersey case (supra).

The above mentioned requested instructions embodied the plaintiff's theory of defendant's liability under the facts and the law obove mentioned. The refusal of the court to grant plaintiff's said requests was made one of the principal grounds of her Motion for New Trial (R. 94-95, l, d, e, f, and g), but the court refused to grant the motion. It was held by this court in **Beckstrom vs. Williams,** 3 Utah 2d 210, 282 P2d 309, that the plaintiff has a right to have

his theory of the case submitted to the jury if the evidence would justify reasonable men in following the theory,, the court saying at page 212 of the Utah Report:

> "The jury having rejected plaintiff's complaint, on appeal we would ordinarily view the evidence in the ligh most favorable to the defendant. This is not true, however, in this case where plaintiff's appeal challenges the trial court's refusal to submit plaintiff's theory of the case to the jury, as was his undoubted right if the evidence would justify reasonable men in following his theory."

The court cited **Morgan vs. Bingham Stage Line Company,** 75 Utah 87, 283 P. 160. In that case the defendant challenged the trial court's ruling refusing to give requested instructions which presented defendant's theory of the case on the evidence. The Supreme Court held that this refusal to grant the requested instructions and to give defendant's theory of the case to the jury was prejudicial error upon which a new trial should be granted, and in so doing the court had the following to say:

> "A party is entitled to have his case submitted to the jury on the theory of his evidence as well as upon the theory of the whole evidence. **Toone vs. O'Neill Const. Co.,** 40 Utah 265, 121 Pacific 10; **Hartley vs. Salt Lake City,** 41 Utah 121, 124 Pacific 522, 523, and **Miller vs. Utah Consolidated M. Co.,** et al, 53 Utah 366, 178 Pacific 771; **Pratt vs. Utah Light and Traction Co.,** 57 Utah 7, 169 Pacific 868."

> "The following language of Mr. Justice Straup in the case of Hartley vs. Salt Lake City, supra, is peculiarly applicable here: 'There are two parties to a

law suit. Each, on a submission of the case to the jury, is entitled to a submission of it on his theory and the law in respect thereof. The defendant's theory as to the cause of the accident is embodied in the proposed request. There is some evidence, as we have shown, to render them applicable to the case. That is not disputed. We think the court's refusal to charge substantially as requested was error. That the ruling was prejudicial and works a reversal of the judgment is self evident and unavoidable,"

In view of the pleadings and the evidence on the record, reasonable men would be amply justified in following the plaintiff's theory of the case. It is the plaintiff's contention that the court committed prejudicial error in refusing to submit same to the jury.

CONCLUSION

We sincerely believe that because the court (1) admitted in evidence the immaterial Plumbing Code, the expert testimony concerning same, and set out the bare code provisions without comment in Instruction No. 15, and (2) refused to submit plaintiff's theory of the case to the jury under the law and the great weight of the evidence, that prejudicial error was committed. We submit that plaintiff, who has been rendered a cripple for the rest of her life as a result of the extremely negligent conduct of defendant, will suffer a grave injustice unless this Court orders a new trial in this case. We earnestly urge, upon the grounds that the above mentioned errors of law committed by the court at the trial are prejudicial to the rights

of plaintiff, that the judgment on the verdict should be reversed and a new trial granted her.

Respectfully submited,

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